72-1011

FILE COPY

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1972

No. 72-1011

WARREN RUDOLPH COOPER,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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To: The Honorable The Chief Justice of the United States and The Honorable Associate Justices of the Supreme Court of the United States.

The petitioner respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit entered against the petitioner which affirmed judgments of conviction and sentence in the United States District Court for the Eastern District of Virginia.

OPINIONS BELOW

There was no opinion delivered by the United States District Court for the Eastern District of Virginia, only a jury verdict of guilty returned on the indictment and the entry of record of this judgment and the later sentence of imprisonment thereupon.

The United States Court of Appeals for the Fourth Circuit did not deliver an opinion, as such, in this case. A brief *per curiam* ruling, affirming the judgments of conviction and sentence, was made on December 21, 1972. This order is appended hereto.

JURISDICTION

The judgment of the United States Court of Appeals for the Fourth Circuit sought to be reviewed was dated and entered on December 21, 1972.

Jurisdiction to review the said judgment of the Court of Appeals by writ of certiorari is conferred by Section 1254 of Title 28 of the United States Code.

QUESTION PRESENTED FOR REVIEW

In a case brought in the Eastern District of Virginia in which the petitioner was charged with the single offense of conspiracy to distribute heroin (21 U.S.C. 846), a central and critical ruling of the court below admitting testimony of a government agent, over objection, that he had a conversation with one Stanard, an alleged co-conspirator, in which he said he told Stanard that he had heard that the petitioner was supplying him with drugs and his further testimony that Stanard agreed, was plain error, violative of the hearsay rule and the co-conspirator exception to the hearsay rule, and basic

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and fundamental constitutional rights of the petitioner were vitiated where this erroneous ruling in turn provided the sole basis for the denial of petitioner's motion for acquittal on the grounds of insufficiency of the evidence and lack of venue.

CONSTITUTIONAL PROVISIONS STATUTES AND RULES INVOLVED

1. United States Constitution

(a) Article III, Section 2 (in part):

> "The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crime shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed."

(b) Amendment V

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, or be deprived of life, liberty, or property, without due process of law; nor shall private liberty be taken for public use, without just compensation.

(c) Amendment VI

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense."

2. Statutes

(a) Title 21, United States Code

(1) Section 841(a)(1)

(a) Unlawful Acts.

Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally–

(1) to manufacture, distribute, or dispense, or possess with intent to manufac ture, distribute, or dispense, a controlled substance; or . . .
(Pub.L. 91-513, Title II, Sec. 401, Oct. 27, 1970, 84 Stat. 1260)

(2) Section 846

Attempt and Conspiracy.

Any person who attempts or conspires to commit any offense defined in this subchapter is punishable by imprisonment or fine or both which may not exceed the maximum punishment prescribed for the offense, the

commission of which was the object of the attempt conspiracy.
(PublL. 91-513, Title II, Sec. 406, Oct. 27, 1970, 84 Stat. 1265.)

3. Rules

(a) Rule 18, Federal Rules of Criminal Procedure

Except as otherwise permitted by statute or by these rules, the prosecution shall be had in a district in which the offense was committed. The court shall fix the place of trial within the district with due regard to the convenience of the defendant and the witnesses.

STATEMENT OF THE CASE

A one-count indictment was returned in the United States District Court for the Eastern District of Virginia. In it the petitioner, Warren Rudolph Cooper (also known as Tom Cooper), was charged with the offense of conspiracy under Title 21, U.S. Code, Section 846. The indictment alleged that on July 12, 1971 in the jurisdiction of the court and elsewhere, the petitioner and one Cornelius Howard Stanard (named as a co-conspirator, but not as a defendant) conspired to unlawfully distribute heroin, a Schedule I narcotic drug controlled substance. Three overt acts were set forth in the indictment as having been committed in furtherance of the conspiracy and to effect its objects: (1) a telephone call on July 12 in Washington, D.C. between the petitioner and the said Cornelius Howard Stanard; (2) a meeting on July 12, 1971 between the two men at 11th and Girard Streets, N.W., Washington, D.C.; (3) a sale of about 165 grams of heroin on July 12, 1971 in Arlington, Virginia to an agent of the Bureau of Narcotics and Dangerous Drugs.

On May 10 and 11, 1972 the petitioner was tried before the Honorable District Judge Oren R. Lewis, sitting with a jury. The jury returned a verdict of guilty; and on June 2, 1972 the petitioner was sentenced to a term of imprisonment of 15 years.

At the trial, Cornelius H. Stanard was the Government's first witness. He said he knew the petitioner and identified him. On July 12, 1971 he negotiated for the sale of heroin to a person named "Eddie." ("Eddie" was in fact an agent of the Bureau of Narcotics and Dangerous Drugs, named Jeffrey Hall.) He said "Eddie" called him on July 12, 1971, and said he wanted to talk with him about something, and that he would be at the Mariott Motor Hotel in Arlington, Virginia. Later that day he met Eddie there.

After he talked to Eddie, he made a phone call to the petitioner, in which he "just asked him could I see him." The reply was, yes. He then went to a whiskey store, the Jet Liquor Store, located at 11th and Rhode Island Avenue, N.W. in Washington, D.C. and there met the petitioner. They had a discussion "concerning a sale of an eighth of heroin." In his own words, Stanard said the discussion was as follows:

"THE WITNESS:

> I asked him was it possible that I could obtain this eighth, and that I had a cash sale, and that I was going to take care of the whole situation myself. That is more or less the whole topic I discussed."

He further said that in this discussion, the petitioner asked him "where was it and so forth, and I told him, and then after he told me it could be arranged he told me he would call me at home." Later, the petitioner called him and told him to meet him in 15 or 20 minutes at 11th

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and Girard Streets, Washington, D.C. The witness drove his automobile to that location and in a couple of minutes the petitioner came, entered his car and laid a package on the seat, saying he would see him later. Stanard said "all right", and then left. After the petitioner gave him this package, the witness said he took it to the Mariott Motor Hotel in Arlington, Virginia. He met "Eddie" there. Eddie entered his car and they rode around the parking lot for a while. During this, they had some conversation. Eddie gave him some money, but it wasn't the exact amount of money that was involved.[1] "Eddie" gave him around $3,500. The witness was to see him the next day around lunch time for the balance of $300. After the exchange of money there were some more words about the money, after which, the witness left and went back to the whiskey store. There he again met the petitioner, gave him the $3,500 and told him about the $300 that was short. The next day he went back to the Mariott, met "Eddie" around lunchtime and received $300 from him. This he kept for himself. This was the full direct testimony of the witness Stanard.

On cross-examination Stanard admitted that "in this case" he was originally charged with distributing 195 grams of heroin and that he was permitted to plead guilty to a lesser offense. It was also brought out that the witness had a four count indictment then pending against him in the District of Columbia; he was "indicted on two sales." The case had not then been tried. Turning to the events of July 12, 1971, the witness said that after the conversation (with Eddie) he made a phone call, and

[1] According to the witness the sum that was fixed between he and Eddie for the narcotics was "around thirty-eight or thirty-seven hundred dollars." This price was fixed after his conversation with petitioner at the liquor store.

went back to Washington. He told the petitioner that he had a cash sale. He also said he told the petitioner that it was "an eighth." The witness was asked whether he had ever brought drugs from the petitioner prior to that time. He replied: "I said I never brought none, period." Under further questioning, the witness admitted that when he received this "eighth" from the petitioner he was getting it for himself, to dispose of as he saw fit, that it was just a buy and seller deal; that what he did with the narcotics and the arrangement he made with it was his own sole business. He also admitted that he did not have to sell the drugs to Eddie who was $300 short; and that when he decided to sell to him on credit it was his sole decision. He also admitted he resold the drugs he received from the petitioner in this manner at his own price.

Jeffrey R. Hall (a special agent with the United States Department of Justice Bureau of Narcotics and Dangerous Drugs), was the Government's next witness. He said he met Cornelius Stanard in April 1971 in his capacity as an undercover agent. He was introduced to Stanard as "Eddie." On July 12, 1971 he called Cornelius Stanard at his apartment and told him he was interested in purchasing an eighth of a kilogram of heroin. At this point counsel for the petitioner objected to the admissibility of any testimony as to their conversation. The court sustained the objection.[2] The court ruled that the witness could tell what he (the witness) did. The witness said that as a result of the phone call, a meeting was arranged for four o'clock that afternoon at the Mariott Motor Hotel in

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[2] During the colloquy concerning this objection, the prosecutor urged to the court that "he (the witness) can testify as to what the co-conspirator said." In answer, the court said: "He can after you establish a conspiracy."

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Arlington, Virginia. The meeting took place in the coffee shop.[3] The witness said they had a meal, and then a conversation for about an hour regarding drugs. At this point the court said to the witness: "you can state everything you said " Thus prompted, the prosecutor put the following questions to the witness:

Q. At that time did you make arrangements for the purchase of an eighth of a kilogram of heroin?

A. Yes, I did.

Q. At that time did you ever establish the source of Mr. Stanard's Drugs?

A. Yes, I did.

Q. Would you tell the court about that?

A. Yes.

During our conversation I told him that I was aware of the people he was associated with."

Counsel for the petitioner then made an objection. The court overruled it.[4] After a brief discussion between counsel and the court on the defense objection, the

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[3]The court said to the witness: "Just what did you do? What did you say and do? You can tell your part. He [Stanard] has told his part of the story. You just tell what you did when he got there."

[4]In making its ruling, the court said:

"There is nothing hearsay about what he did. This is what he did."

Counsel for the petitioner told the court that the witness was relating a conversation. The court, in further explanation of its ruling, at this point said:

"He's telling about he told him that he knew."

"Objection is overruled. He can tell him. Certainly he can."

witness testified that he told Stanard that he knew that he was tied up with Tom and Andrew. By "Tom", he said he meant Tom Cooper (the petitioner). He further said he told Stanard that he knew who his people were, that he had learned from somebody else who his people were. He said he confronted him with this and he agreed. The prosecutor at this point asked him: "At that time then did he admit, that in fact, Tom Cooper was his man? The witness said "yes, he did." The witness further said that Stanard said he was going to call his man. Stanard got up, and the witness believes he went to make a phone call. When Stanard returned, the witness said, Stanard said he'd have to go try and find his man. At this point the court interrupted and the following occurred:

"THE COURT: When he said his man, did he name who he was going to find or did he just say his man? You mentioned two men.

"THE WITNESS: No.

"THE COURT: So the jury will have the whole story.

"THE WITNESS: Yes. Well, I established, as I said, earlier in the conversation with him, I established the fact that he meant by his man Tom, and so from then on whenever he said, he either said Tom or my man, I'm going to go call my man or I've got to go call Tom, and then I didn't question him any more.

If he said "my man", I knew who he was talking about.

"THE COURT: All right."

After the government rested its case, the petitioner made a motion for judgment of acquittal. The essential grounds of the motion was whether venue of the alleged

offense purportedly committed by the defendant was established to lie with the court. It was also urged to the court by the defense that the evidence did not establish that the defendant was guilty of the crime of conspiracy. The court ruled that it was going to submit the case to the jury. The court, however, did intimate that it would tell the jury in the instruction that if Cooper was only a supplier, that is, that he sold the drugs to Stanard on an arm's length basis, then Cooper would not be guilty of conspiracy.

The court instructed the jury as to the law in the case. The jury retired to consider its verdict. Shortly, they returned and announced that they had found the defendant guilty.

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT

There are two reasons, grounded upon constitutional bases, why the writ of certiorari to review the Circuit Court judgment in this case should be allowed. In the context of the trial court proceedings that led to the petitioner's conviction, which was left undisturbed by Circuit Court review, one erroneous ruling by the trial court cast a focus to the proceedings that prevented a correct ruling on two other vital issues during the trial. In this case the petitioner was indicted for the offense of conspiracy. The admissible evidence was insufficient to establish that charge. The trial court improperly admitted hearsay evidence through the witness Hall that did tend to establish a conspiracy. No other government evidence pointed in that direction. As has been consistently contended by the petitioner throughout this record, his offense, if any, was not that of conspiracy, which was

charged in the Eastern District of Virginia, but that of the substantive offense of distribution and possession of drugs in Washington, D.C., then there was no venue existing at the place where the charge was brought. The two reasons why the writ should be allowed are:

(1) The admission of the testimony of agent Hall of his statement to Stanard concerning the petitioner and his further testimony of Stanard's reply, in each respect, flagrantly violated the established rules of evidence in federal trials (*Glasser v. United States*, 315 U.S. 60, 74) such as to trench upon the petitioner's constitutional right to a fair trial and due process of law.

(2) The provisions of Article III, Section 2 of the Constitution regarding the venue of criminal trials create safeguards for the rights of citizens and are reinforced by the command of the Sixth Amendment. *Travis v. United States*, 364 U.S. 631, 634 (1961).

The determination by the courts below that venue was properly laid, itself erroneous, was predicated upon the earlier erroneous ruling that a prima facie case of conspiracy had been established. If the Government's evidence were shorn of its inadmissible part, no conspiracy was established, and thus venue was not properly laid. The question of venue was loosely decided with the result that the Government was given the choice of "a tribunal favorable" to it. *United States v. Johnson*, 323 U.S. 273, 275. This construction totally ignored the rule set forth by this Court and consistently followed by lower federal courts that "questions of venue are more than matters of mere procedure." *Travis v. United States, supra.* "They raise deep issues of public policy." *United States v. Johnson, supra* 276.

ARGUMENT

The direct evidence against the petitioner came in the testimony of the witness Stanard. He testified that on July 12, 1971 after his negotiations with "Eddie" (the undercover agent), he called the petitioner in Washington, D.C.; later went to see him; and still later that day obtained a package from the petitioner containing drugs that he in turn distributed (sold) to "Eddie" in Arlington, Virginia. All of the petitioner's conversations and actions in this matter were done by him in Washington, D.C.[5] In spite of what obviously amounted to the commission of substantive law violations by the petitioner in Washington, D.C. (distribution of heroin to Stanard, 21 U.S. Code, Section 841(a)(1); and the possession of heroin with the intent to distribute same, 21 U.S. Code, Section 841(1)(2)), he was indicted for conspiracy[6] (under 21 U.S. Code 846) in the Eastern District of Virginia—the place where Stanard distributed the drugs. The testimony of Stanard did not establish in any respect, that at any time, a conspiracy existed between him and the petitioner to unlawfully distribute heroin. In fact, his direct

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[5]Two agents of the Bureau of Narcotics and Dangerous Drugs had the liquor store under surveillance on July 12, 1971. They observed the petitioner at the store as well as a car he used and saw Stanard come to the store. They also observed the petitioner and Stanard meet that evening at 11th and Girard Streets, N.W., Washington, D.C.

[6]"There is, of course, strong temptation to relax rigid standards when it seems the only to sustain convictions of evildoers. But statutes authorize prosecution for substantive crimes for most evildoing without the dangers to liberty of the individual and the integrity of the judicial process that are inherent in conspiracy charges." *Krulewitch v. United States,* 336 U.S. 440, 457, 69 S.Ct. 716, 93 L.Ed. 790 (1949), Jackson, J., concurring.

testimony, and as further illuminated by cross-examination, showed the contrary: his transaction with the petitioner was isolated; the petitioner gave him the drugs at a certain price; he resold them to his own customer for a profit. As regards this single, solitary dealing between the two men it totally lacked the elements or characteristics of a conspiracy. The principle asserted here is familiar and deeply ingrained in the federal narcotics conspiracy case law.[7] In a leading Second Circuit case, it was ruled:

> "A single act may be the foundation for drawing the actor within the ambit of a conspiracy. . . . But since conviction of conspiracy requires an intent to participate in the unlawful enterprise, the single act must be such that one may reasonably infer from it such an intent . . ."
> *United States v. Aviles, supra,* ft.n. 6, 274 F.2d at p. 189.

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[7] *United States v. Aviles* (2nd Cir., 1960), 274 F.2d 179 at page 189, cert. denied; *Barcellona v. United States,* 362 U.S. 982, 80 S.Ct. 1073, 4 L.Ed.2d 1016 (1960) (as to the defendant Rodrequez); *United States v. Kock* (10 Cir. 1940) 113 F.2d 984, p. 983; *United States v. Reina* (2 Cir. 1957), 242 F.2d 302, at p. 305-306, cert. denied, 354 U.S. 913, 77 S.Ct. 1294, 1 L.Ed.2d 1427 (1957) (as to the appellant Valachi); *United States v. Mancino* (Dist. Ct. S.D.N.Y. 1960) 179 F.Supp. 897 at p. 899; *United States v. Stromberg,* 286 F.2d 256 at p. 267, cert. denied, Sub. nom *Lessa v. United States,* 361 U.S. 863, 868, 80 S.Ct. 119, 4 L.Ed.2d 102 (1959) (as to appellant Snyder); *United States v. Santore* (2 Cir. 1960) 290 F.2d 51 at p. 78 (on rehearing *en banc*) (as to appellants Tarlentino and Narducci); and also see *United States v. DeNoia* (2 Cir. 1971) 451 F.2d 979, at p. 981 (discussion regarding DeNoia's conviction on the conspiracy count); Cf. *United States v. Hernandez-Canneras* (9 Cir. 1971) 451 F.2d 1315.

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The significant features of the testimony of Stanard in relationship to the later appearance of Agent Hall as a witness in the case are three-fold: (1) Stanard, the cooperating unindicted co-conspirator preceeded Hall to the stand in the Government's case; (2) if there was a conspiracy between he and the petitioner and possibly others he was the repository of the knowledge of its details and should have been called upon to testify regarding its scope, duration, operation and purposes; and (3) Stanard *did not* testify (as Hall later did) that in his conversations with Hall on the 12th of July he acknowledged that the petitioner was "his man."

The crucial error in this case took place during the direct testimony of the witness Agent Hall when he was permitted to testify over constant defense objections that during his first meeting with Stanard at the Mariott Motor Hotel on July 12, 1971 he told Stanard that he was aware, from learning from someone else, who Stanard's people were and that Tom (the petitioner) was his man. He also testified that Stanard acknowledged this. The plain meaning and clear effect of this testimony is that the petitioner was and had been for some while the source of drugs that Stanard was distributing, in other words, there existed an agreement or conspiracy involving the two men. The admission of this testimony constituted a fundamental violation of the hearsay rule, even as applied to conspiracy cases. This error so extensively deprived the petitioner of procedural and substantive due process of law, guaranteed under the Fifth Amendment, that the judgments by the lower courts are a nullity. The notion that a law enforcement witness can testify as to what he told an alleged co-conspirator about the peti-

tioner, which is itself replete with hearsay[8] has not been heretofore sanctioned or authorized. No court has expanded the rules of federal evidence so far.[9] The trial court's ruling in this regard and the Circuit Court's affirmation of the judgment represent a drastic and extreme departure from settled federal law and is not likely to be sanctioned by this Court. The fact that Hall in his testimony said that Stanard, when confronted with this hodge-podge of hearsay, agreed with it, does not elevate to the level of admissible evidence the statement or the reply of Stanard. Dealing with Hall's testimony that Stanard agreed to Hall's statements about the petitioner, the requirements of the settled rule of law, known as the co-conspirator exception to the hearsay rule, were not met:

> "Before the declarations of co-conspirators can be received in evidence against one charged with participating in the conspiracy, *it must be shown by independent evidence that the conspiracy existed and that the accused was a party to it at the time the declarations were made.*" (emphasis supplied)

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[8] "I told him that I was aware of the people he was associated with"; "I told him that I knew he was tied up with Tom and Andrew"; "I had learned from someone else who his people were".

[9] "No cause has been cited to us which has ever so applied the conspiracy rule as to allow introduction of words or deeds *of* a government agent *to* an alleged co-conspirator out of the presence of the defendants. Certainly the reason for the exception ceases to exist where, in fact, there is no community of interest between actor and defendant. Nor does the conspiracy rule apply to make the words and deeds of the narcotic agents admissible merely because the appellants may have believed that the agents were their co-conspirators." *United States v. Morrello,* 250 F.2d 631, 634 (2nd Cir., 1957).

Nibbelink v. United States, 66 F.2d 178, 179 (6th Cir., 1933).[10]

Stanard, as pointed out, had testified before Hall in the trial. He did not give any testimony to the effect that the petitioner was "his man", or a person from whom he had previously received drugs, or that there was an agreement, expressed or implied, to distribute drugs. Remarkably, Stanard was not recalled as a government witness to give direct testimony as to any of this. Thus, the testimony of Hall remains on the footing of inadmissible hearsay. *United States v. Ah Kee Eng,* 241 F.2d 157, 159 (2nd Cir., 1957); *United States v. Williamson,* 450 F.2d 585, 591 (5th Cir., 1971).

The ruling that this testimony of Hall was admissible created a quagmire in which the trial court was hopelessly trapped when the motion for judgment of acquittal on the grounds of insufficiency of the evidence and lack of venue were presented.

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[10] See also *Glasser v. United States,* 314 U.S. 60, 74, 62 S.Ct. 457, 86 L.Ed. 680, 701; *Taylor v. United States,* 260 F.2d 737 (D.C. Cir., 1958); *Montford v. United States,* 200 F.2d 758, 759 (5th Cir., 1952); *Minner v. United States,* 57 F.2d 506, 511 (10th Cir., 1932); *Mayola v. United States,* 71 F.2d 65, 67 (9th Cir., 1934).

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 72-1867

United States of America,

Appellee,

versus

Warren Rudolph Cooper

Appellant.

Appeal from the United States District Court for the Eastern District of Virginia, at Alexandria. Oren R. Lewis, District Judge.

(Argued December 4, 1972. Decided December 21, 1972.)

Before BOREMAN, Senior Circuit Judge, and CRAVEN and BUTZNER, Circuit Judges

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John A. Shorter, Jr. (T. Brooke Howard on brief) for Appellant; K. Gregory Haynes, Assistant United States Attorney (Brian P. Gettings, United States Attorney, on brief), for Appellee.

PER CURIAM:

Warren Rudolph Cooper was convicted on a single-count indictment charging him and Cornelius Howard Stanard, the latter named as a co-conspirator but not as a defendant, with conspiring to distribute heroin in violation of Title 21 U.S.C. §846.

Upon consideration of the briefs, the appellant's appendix, and argument of counsel, we find no reversible error and the judgments of conviction and sentence will be affirmed.

Affirmed.